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U.S. Citizenship
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Services

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[redacted]

FILE: LIN 06 080 52204 Office: NEBRASKA SERVICE CENTER Date: AUG 28 2007

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a lead aerospace engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we concur with the director that the petitioner has not established that a waiver of the alien employment certification is warranted in the national interest.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Master's degree in Engineering from the Institute of Engineering Thermophysics of the Chinese Academy of Sciences and a second Master's degree in Mechanical Engineering from Washington State University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

The petitioner has also submitted evidence relating to the regulatory criteria for aliens of exceptional ability. Specifically, the petitioner submitted evidence of his professional membership in the American Institute of Aeronautics and Astronautics (AIAA) and, on appeal, evidence of salary ranges in his occupation, purportedly demonstrating his high remuneration.[1] This evidence relates to the criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii)(D), (E). The issue of exceptional ability, however, is moot because, as stated above, the petitioner qualifies as a member of the professions holding an advanced degree. *Matter of New York State Dep't of Transp.,* 22 I&N Dec. 215, 216 (Comm. 1998)[hereinafter "NYSDOT"]. Because exceptional ability, by itself, does not justify a waiver of the alien employment certification requirement, arguments hinging on the criteria for that classification, while relevant, are not dispositive to the matter at hand. *Id.* at 222.

The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest. Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

NYSDOT, 22 I&N Dec. at 217-18, has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will

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[1] The record contains no evidence of the petitioner's remuneration, such as a Form W-2 Wage and Tax Statement or a pay stub. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). While a manager at Boeing asserts on appeal that the petitioner is under consideration for a promotion to a Level 3 Engineer, this assertion does not establish the petitioner's actual compensation as of the date of filing, the date on which the petitioner must establish his eligibility. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, mechanical and aerospace engineering, and that the *proposed* benefits of his work, improved propulsion systems with applications in the aerospace, nano-technologies, biomedical and printing industries, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Counsel discusses the importance of the petitioner's area of research, safer rockets, and a specific project, the completion of the Boeing 787. Eligibility for the waiver, however, must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218.

Ann Ayson, a manager at Boeing, asserts that the petitioner's skills are "classified as 'hard to recruit.'" It cannot suffice, however, to state that the alien possesses useful skills, or a "unique background." *Id.* at 221. Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.*

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. In this regard, counsel focuses on the fact that the petitioner is the sole inventor listed on two patent applications, one of which was approved after the date of filing. The petitioner has submitted the patent applications and two letters from the patent attorney who filed them asserting that, based solely on the likelihood that the patent applications would be approved and the potential future applications of the innovations, it is in the national interest for the petitioner to remain in the United States. An alien cannot secure a national interest waiver, however, simply by demonstrating that he holds a patent. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) does not have the technical expertise to comprehend the technical significance represented on the patent applications and asserts that the director should have obtained an outside expert opinion. The statute, regulations and relevant precedent decision, however, do not require us to form an opinion as to the *potential* significance of the petitioner's patent applications. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. Thus, the petitioner cannot simply demonstrate that he has patented technology that may prove useful, but must document that such technology is already influencing the field to at least some degree.

As stated above, the petitioner has obtained two Master's degrees in engineering. He has been working at Boeing since 2001 while also pursuing a Ph.D. The record contains a conference presentation, two published articles and an e-mail notification that a third article had been accepted for publication. The petitioner's 2002 article was cited along with five other articles for the same proposition in a review article. On appeal, counsel notes that Boeing has a proprietary interest in the petitioner's current research, limiting its availability for publication and recognition in the field. A proprietary interest is a legitimate reason for delaying or limiting publication, which should be taken into account in evaluating a researcher's publication record. Nevertheless, working on projects in which there is a proprietary interest does not relieve the petitioner of demonstrating that at least some of his innovations have already proven significant and influential.

The petitioner initially submitted three letters. While counsel asserts on appeal that the letter from [redacted], a Chief Scientist at L3 Communications, is from the representative of a company in competition with the petitioner's current employer, Boeing, [redacted] refers to joint projects between Boeing and L3. Significantly, according to his curriculum vitae submitted into the record, [redacted] worked for Boeing from 2001 through 2005, overlapping with the petitioner, who also began there in 2001. Thus, all of the letters are from the petitioner's mentors and close colleagues. While such letters are useful in documenting the petitioner's roles on various projects, they cannot demonstrate the petitioner's influence beyond his immediate circle of colleagues. Moreover, as will be discussed below, the letters do not affirm that the petitioner's inventions have already proven useful even at Boeing.

[redacted] discusses the petitioner's participation in a space propulsion joint project between L3 and Boeing. The petitioner was unable to continue working on this project due to his nonimmigrant status. [redacted] also discusses the petitioner's patented Ultrasonic Aided Electrospraying (UAE) technology, which uses an applied electric field to create charged nanoparticles from room temperature liquid propellant. [redacted] speculates that UAE "will advance space propulsion technology beyond how we know it today." [redacted] discusses all of the advantages of UAE and asserts that upon publication of the petitioner's work on UAE, many companies and research institutes have shown a strong interest in the research. In particular, [redacted] asserts that as "far as I know, The L-3 Company, Aerojet and the University of Washington are interested in playing a role in developing electric thrusters based on [the petitioner's] research work." The petitioner, however, has collaborated with [redacted] at Boeing and now at L-3 and is pursuing his Ph.D. at the University of Washington. The record contains no letters

from anyone at Aerojet confirming their interest in licensing or otherwise utilizing UAE. Finally, while [redacted] discusses applications in other fields, the record lacks letters from anyone in those fields confirming their interest in licensing or otherwise utilizing UAE. The record contains no other evidence of the field's recognition of UAE, such as evidence that the petitioner's article on UAE is widely cited or articles in trade journals or the general media discussing Boeing's advantage in developing UAE technology.

In addition, the petitioner submitted a joint letter from [redacted] of Boeing Phantom Works and [redacted], Counsel at Phantom Works. The record does not establish [redacted] position with Boeing Phantom Works. The letter confirms that the petitioner's propulsion research "has the potential to significantly improve the capability and reliability of various spacecraft by providing high thrust level and variable specific impulse while consuming much less energy than current technology." The letter does not suggest that Boeing has already confirmed the benefits of UAE.

Finally, [redacted]k, the petitioner's Ph.D. dissertation advisor at the University of Washington, asserts that he and the petitioner have been invited to submit a full proposal to obtain research funds from the University of Washington and Boeing to pursue the petitioner's electric propulsion technology. [redacted] asserts that the technology "has the potential to substantially improve the efficiency and thrust levels of presently available electric thrusters for satellite propulsion." [redacted] then concludes that the petitioner has "tremendous potential to make important contributions.' [redacted] does not identify any research or innovation by the petitioner that has already proven useful, let alone influential.

On appeal, the petitioner submits a letter from [redacted] asserts that Boeing has only recently allocated funding to "explore [the] feasibility" of the petitioner's nano coatings. [redacted] speculates that "if" these materials are successful, Boeing will obtain a competitive technological advantage with the new Boeing 787 and future aircraft. While [redacted] asserts that this particular project would be adversely impacted by the petitioner's absence, she does not indicate that the successful completion of the entire 787 aircraft would be similarly impacted as implied by counsel.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to present some benefit if it is to receive funding and attention from the scientific community. The petitioner's research clearly has practical applications; however, the record lacks evidence that any of the petitioner's innovations have been pursued, tested *and confirmed* to be as useful as predicted.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not

established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.